BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MICHAEL SWINDLE	)	
Claimant	)	
V.	)	Docket No. 1,070,963
	)	
RUBBERMAID SPECIALTY PRODUCTS	)	
Self-insured Respondent	)	

ORDER

Both parties request review of Administrative Law Judge Gary K. Jones' October 7, 2015 preliminary hearing Order. W. Walter Craig appeared for claimant. Terry J. Torline appeared for self-insured respondent.

The record on appeal is the same as that considered by the judge and consists of claimant's September 24, 2014 evidentiary deposition transcript with attached exhibits, the October 9, 2014 preliminary hearing transcript with attached exhibits, the April 7, 2015 preliminary hearing transcript with attached exhibits, and the October 6, 2015 preliminary hearing transcript with attached exhibits, in addition to all pleadings contained in the administrative file.

ISSUES

1. Did claimant, on August 14, 2014, injure his lateral meniscus in an accident which arose out of and in the course of his employment, including whether the accident was the prevailing factor causing his lateral meniscus tear?

2. Does the Board have jurisdiction to consider claimant's argument regarding temporary total disability (TTD) benefits?

FINDINGS OF FACT

Claimant worked for respondent as a forklift driver. On August 14, 2014, claimant stepped off the forklift with his left foot and slipped on a piece of cardboard on the ground. He felt a pop in his left knee and experienced a sharp, stabbing pain. Claimant continued to work, but was favoring his left knee. His pain increased and respondent provided medical treatment. An MRI dated September 8, 2014, revealed a torn medial meniscus but noted the "lateral meniscus is intact."[1]

[1] P.H. Trans. (Oct. 6, 2015), Resp. Ex. 1.

On November 25, 2014, claimant underwent a left knee arthroscopy which included a partial medial meniscectomy by Kenneth Jansson, M.D. According to the operative report, Dr. Jansson noted "the lateral meniscus, femoral condyle and tibial plateau were normal" in the lateral compartment.[2] Postoperatively, claimant received physical therapy and a corticosteroid injection. On January 14, 2015, Dr. Jansson released claimant at maximum medical improvement (MMI) with no restrictions.

At claimant's attorney's request, David Hufford, M.D., evaluated claimant on February 3, 2015. Claimant complained of continued left knee pain with swelling and a feeling of instability. Physical examination of the left knee revealed generalized tissue edema without an apparent effusion. There was tenderness at the medial and lateral joint lines and patellar crepitus with movement. Dr. Hufford found good stability and was able to extend claimant's left knee to 0° without difficulty. Dr. Hufford noted claimant apparently had a medial mensicus tear due to a twisting injury at work. The doctor stated:

> He has significant osteoarthritic change in the knee. Some orthopedic surgeons believe that arthroscopy performed in the setting of underlying osteoarthritis may aggravate and accelerate this condition. I believe this may have occurred in his case. He has continued pain, patellar crepitus and swelling which is indicative of a smoldering inflammatory state.[3]

Dr. Hufford recommended a series of knee injections and provided temporary work restrictions of no kneeling, squatting or use of stairs or ladders.

Following a preliminary hearing on April 7, 2015, the judge appointed Daniel Stechschulte, M.D., to examine claimant and provide an opinion if claimant's accident was the prevailing factor in his need for medical treatment.

Dr. Stechschulte evaluated claimant on June 12, 2015. He took x-rays showing no evidence of a fracture, dislocation or loose body, but moderate loss of medial joint space and mild loss of patellofemoral and lateral joint space. The doctor noted the surgical photos demonstrated: (1) grade IV change at the patellofemoral joint with osteophytes; (2) acute, complex medial meniscus tear with appropriate resection margins; (3) intact medial compartment; and (4) lateral meniscus and compartment intact.

Among relevant diagnoses, Dr. Stechschulte indicated claimant had refractory left knee pain, preexisting left knee patellofemoral osteoarthritis with symptomatic exacerbation, status-post left knee arthroscopic partial medial meniscectomy, chondroplasty and plica resection, as well as extreme morbid obesity. Dr. Stechschulte did not list a left lateral meniscus injury.

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[2] *Id.*, Resp. Ex. 2 at 2.

[3] P.H. Trans. (Apr. 7, 2015), Cl. Ex. 1 at 2.

Dr. Stechschulte recommended a repeat MRI of the left knee using a closed, quality scanner and evaluation by an orthopedic physician. Regarding prevailing factor, Dr. Stechschulte stated:

> Based upon his history, the provided records, and his clinical and radiographic examination, it appears that Mr. Swindle's reported work injury of 08/14/2014 is the prevailing and primary cause of his **left** knee complaints, within a reasonable degree of medical certainty.[4]

By Agreed Order filed July 24, 2015, Dr. Stechschulte was authorized to refer claimant for a repeat MRI, compare it to the prior MRI and provide opinions regarding further treatment. On August 13, 2015, claimant returned to Dr. Stechschulte. Claimant reported a slight improvement, but still had ongoing pain, locking and catching. After reviewing MRI films from that day, Dr. Stechschulte noted:

> MRI L knee 08/13/15 demonstrates a tear of the lateral meniscus. There is also irregularity to the medial meniscus, but no obvious tear. There is interval progression and cartilage loss of the central weightbearing aspect of the MFC and PFJ. No knee effusion, loose body, or fracture is appreciated.[5]

Dr. Stechschulte diagnosed claimant with refractory left knee pain, a probable lateral meniscus tear and an exacerbation of preexisting degenerative arthritis. Dr. Stechschulte believed claimant's biggest problem was his weight (5'9", 270 pounds). The doctor recommended a repeat left knee arthroscopy, but opined the surgery had a 50% chance of success at best.

In the October 7, 2015 Order, the judge ordered treatment with Dr. Stechschulte and denied payment of TTD:

> The Claimant's request for medical treatment is granted. The weight of the evidence indicates the accident is the prevailing factor for the Claimant's need for treatment. The Claimant had no left knee problems before the accident. Dr. Stechschulte, who performed a court-ordered independent medical exam, says in his June 12, 2015, report that the August 14, 2014, accident is the prevailing factor for the Claimant's left knee complaints, and he does not change that opinion in his subsequent notes.
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> There is an unexplained discrepancy between the operative note of November 25, 2014, and the MRI of August 13, 2015. The operative note says that in the lateral compartment the lateral meniscus is intact. Dr. Stechschulte's notes of September 11, 2015, say that the Claimant has a probable lateral meniscus tear.

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[4] Stechschulte Report (June 12, 2015) at 3-4 (bold in original).

[5] Stechschulte Report (Aug. 13, 2015) at 1.

> That discrepancy is not sufficient to overcome Dr. Stechschulte's opinion that the accident is the prevailing factor for the need for treatment. Dr. Stechschulte was sent an agreed order dated July 24, 2015, and asked to provide an opinion regarding the need for further treatment related to the August 14, 2014, accident, and again he did not indicate any change from his previous opinion that the accident was the prevailing factor for the need for treatment. Dr. Stechschulte does say in his notes that the Claimant has degenerative arthritis which is preexisting, but the proposed arthroscopic surgery does not appear to be primarily treatment for that condition.
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> Dr. Stechschulte is designated as the Claimant's authorized physician for his left knee complaints. All treatment, tests and referrals are authorized.
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> The Claimant's request for TTD is denied. Neither the previous treating physician, Dr. Jansson, nor Dr. Stechschulte have said the Claimant is unable to work. If Dr. Stechschulte imposes temporary restrictions on the Claimant, then TTD is ordered paid from the time the temporary restrictions are imposed until the Claimant is released to return to work, has been offered accommodated work within the temporary restrictions, has attained maximum medical improvement or further order of the Court.[6]

Both parties appealed. Respondent requests the Order be reversed, arguing claimant did not injure his lateral meniscus in his August 14, 2014 accident and any such injury did not arise out of and in the course of his employment. Respondent notes claimant's original injury involved the medial meniscus, not the lateral meniscus. Respondent suggests the judge should have sought clarification from Dr. Stechschulte regarding how claimant's accident could have caused a lateral meniscus tear when such tear was not identified at the time of claimant's medial meniscus surgery. Respondent asserts the cause of the lateral meniscus tear was "unexplained," thus idiopathic and non-compensable. Additionally, respondent argues the Board lacks jurisdiction to review claimant's appeal regarding denial of TTD.

Claimant alleges his work accident of August 14, 2014, or the direct and natural result thereof, caused his lateral meniscus tear. Claimant requests both appeals, including his own appeal regarding TTD, be dismissed for lack of jurisdiction. Claimant does not state why the Board lacks jurisdiction over respondent's appeal. Claimant also requests that if the Board hears respondent's arguments, any and all issues should be decided, including the TTD issue. If so, claimant argues the Order be modified, such that he be granted TTD benefits because Dr. Hufford determined he was not at MMI and imposed temporary work restrictions.

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[6] ALJ Order (Oct. 7, 2015) at 1-2. The record contains no September 11, 2015 report from Dr. Stechschulte. It appears the doctor's August 13, 2015 report was printed on September 11, 2015.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.[7] The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.[8]

K.S.A. 2014 Supp. 44-508 provides:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
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> (f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
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> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
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> (B) An injury by accident shall be deemed to arise out of employment only if:
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> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
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> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

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[7] K.S.A. 2014 Supp. 44-501b(b).

[8] K.S.A. 2014 Supp. 44-501b(c) and K.S.A. 2014 Supp. 44-508(h).

> (3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
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> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
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> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
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> (iii) accident or injury which arose out of a risk personal to the worker; or
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> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.
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> (g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.
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> (h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is compensable. "When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury."[9] Whether an injury is a natural and probable result of previous injuries is generally a fact question.[10]

On an appeal from a preliminary hearing Order, the Board can review only allegations that the judge exceeded his or her jurisdiction under K.S.A. 2014 Supp. 44-551 and issues listed in K.S.A. 2014 Supp. 44-534a(a)(2) as jurisdictional issues. K.S.A. 2014 Supp. 44-534a(a)(2) grants a judge jurisdiction to decide issues concerning medical treatment and temporary total disability benefits. "Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly."[11]

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[9] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[10] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶ 1, 128 P.3d 430 (2006).

[11] *Allen v. Craig*, 1 Kan. App. 2d 301, 304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

ANALYSIS

Claimant's 2014 MRI did not reveal a lateral mensicus tear. Dr. Jansson did not identify a lateral mensicus tear when he inspected claimant's left knee during his 2014 medial meniscus surgery. The MRI report and the surgical report state claimant's lateral meniscus was intact. Dr. Stechschulte only diagnosed claimant as having a probable lateral meniscus tear after claimant's 2015 MRI.

The judge noted there was an unexplained discrepancy between the operative note of November 25, 2014 (no evidence of a lateral meniscus tear), and the August 13, 2015 MRI (evidence of a lateral meniscus tear), but the discrepancy did not undermine Dr. Stechschulte's prevailing factor opinion. This Board Member reaches a different result.

Dr. Stechschulte's prevailing factor opinion was issued on June 12, 2015, before he diagnosed a lateral meniscus tear on August 13, 2015. Dr. Stechschulte did not specify that claimant's lateral meniscus was torn on August 14, 2014, or that such accident was the prevailing factor in claimant's torn lateral meniscus. After Dr. Stechschulte issued his follow-up report, he did not comment that the prevailing factor in claimant's left lateral meniscal tear was claimant's 2014 accident. Rather, he remained silent on the issue.

To this Board Member, there is a disconnect between relying on a physician's prevailing factor opinion, which did not concern the lateral meniscus tear, to satisfy claimant's burden of proving his accident was the prevailing factor in his left lateral meniscal tear. Quite simply, the record is silent regarding the prevailing factor with respect to the left lateral meniscal tear. It is also difficult for this Board Member to causally link a lateral meniscus injury to the original accident when such tear did not exist on the 2014 MRI film, no such tear was seen during the 2014 medial mensicus surgery, and there is no evidence the tear is the direct and natural consequence of the original injury.

Absent an explanation (which is lacking in the record), common sense dictates that a physical defect that only appears after the initial MRI and surgery is not due to the original accidental injury. Claimant has the burden of proof and did not establish the compensability of his lateral meniscus tear by a preponderance of the credible evidence.

The judge did not exceed his jurisdiction in denying TTD. Whether claimant meets statutory criteria to be awarded TTD is not a jurisdictional issue listed in K.S.A. 2014 Supp. 44-534a(a)(2). As such, claimant's appeal is dismissed.

CONCLUSIONS

The preliminary hearing Order is reversed with respect to claimant's left lateral meniscus tear. Claimant did not prove he sustained a left lateral meniscus tear in either his original accident or as a direct and natural result thereof. The TTD issue is not appealable from a preliminary hearing.

WHEREFORE, the undersigned Board Member reverses the October 7, 2015 preliminary hearing Order regarding the compensability of claimant's left lateral meniscus tear and otherwise dismisses claimant's appeal of the TTD issue.[12]

IT IS SO ORDERED.

Dated this _____ day of November, 2015.

_____
HONORABLE JOHN F. CARPINELLI
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Honorable Gary K. Jones

[12] By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.